# Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

# and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 26 MARCH 18, 1992 No. 12

*This issue contains:*



THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

## NOTICE

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# U.S. Customs Service

## *Treasury Decisions*

(T.D.92–24)

### FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR FEBRUARY 1992

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign countries shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Monday, February 17, 1992.

Greece drachma:

| | |
|---|---|
| February 3, 1992 | $0.005414 |
| February 4, 1992 | .005424 |
| February 5, 1992 | .005430 |
| February 6, 1992 | .005463 |
| February 7, 1992 | .005520 |
| February 10, 1992 | .005484 |
| February 11, 1992 | .005427 |
| February 12, 1992 | .005379 |
| February 13, 1992 | .005329 |
| February 14, 1992 | .005322 |
| February 18, 1992 | .005245 |
| February 19, 1992 | .005259 |
| February 20, 1992 | .005267 |
| February 21, 1992 | .005242 |
| February 24, 1992 | .005267 |
| February 25, 1992 | .005291 |
| February 26, 1992 | .005242 |
| February 27, 1992 | .005270 |
| February 28, 1992 | .005284 |

South Korea won:

| | |
|---|---|
| February 3, 1992 | $0.001304 |
| February 4, 1992 | N/A |
| February 5, 1992 | .001304 |
| February 6, 1992 | .001304 |
| February 7, 1992 | .001302 |
| February 10, 1992 | .001301 |
| February 11, 1992 | .001300 |

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 1992 (continued):

South Korea won (continued):

| | |
|---|---|
| February 12, 1992 | $0.001300 |
| February 13, 1992 | .001301 |
| February 14, 1992 | .001301 |
| February 18, 1992 | .001299 |
| February 19, 1992 | .001297 |
| February 20, 1992 | .001297 |
| February 21, 1992 | .001295 |
| February 24, 1992 | .001294 |
| February 25, 1992 | .001294 |
| February 26, 1992 | .001296 |
| February 27, 1992 | .001296 |
| February 28, 1992 | .001295 |

Taiwan N.T. dollar:

| | |
|---|---|
| February 3, 1992 | N/A |
| February 4, 1992 | N/A |
| February 5, 1992 | N/A |
| February 6, 1992 | N/A |
| February 7, 1992 | $0.040000 |
| February 10, 1992 | .039977 |
| February 11, 1992 | .039968 |
| February 12, 1992 | .039986 |
| February 13, 1992 | .040047 |
| February 14, 1992 | .040016 |
| February 18, 1992 | .039956 |
| February 19, 1992 | .039896 |
| February 20, 1992 | .039880 |
| February 21, 1992 | .039903 |
| February 24, 1992 | .039888 |
| February 25, 1992 | .039874 |
| February 26, 1992 | .039868 |
| February 27, 1992 | .039825 |
| February 28, 1992 | .039754 |

(LIQ–03–01 S:ISD CIE)
Dated: March 3, 1992.

MICHAEL MITCHELL,
*Chief,*
*Customs Information Exchange.*

(T.D. 92–25)

## FOREIGN CURRENCIES

### VARIANCES FROM QUARTERLY RATES FOR FEBRUARY 1992

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 92–1 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Holiday: Monday, February 17, 1992.

Austria schilling:

| | |
|---|---|
| February 12, 1992 | $0.088316 |
| February 13, 1992 | .087524 |
| February 14, 1992 | .087291 |
| February 18, 1992 | .086237 |
| February 19, 1992 | .086244 |
| February 20, 1992 | .086244 |
| February 21, 1992 | .086096 |
| February 24, 1992 | .086281 |
| February 25, 1992 | .086580 |
| February 26, 1992 | .086088 |
| February 27, 1992 | .086468 |
| February 28, 1992 | .086790 |

Belgium franc:

| | |
|---|---|
| February 12, 1992 | $0.030239 |
| February 13, 1992 | .029931 |
| February 14, 1992 | .029842 |
| February 18, 1992 | .029490 |
| February 19, 1992 | .029525 |
| February 20, 1992 | .029533 |
| February 21, 1992 | .029472 |
| February 24, 1992 | .029499 |
| February 25, 1992 | .029656 |
| February 26, 1992 | .029420 |
| February 27, 1992 | .029568 |
| February 28, 1992 | .029709 |

Denmark krone:

| | |
|---|---|
| February 13, 1992 | $0.159236 |
| February 14, 1992 | .158617 |
| February 18, 1992 | .156691 |
| February 19, 1992 | .156568 |
| February 20, 1992 | .156495 |
| February 21, 1992 | .156226 |
| February 24, 1992 | .156519 |
| February 25, 1992 | .157344 |
| February 26, 1992 | .156177 |
| February 27, 1992 | .156826 |
| February 28, 1992 | .157555 |

FOREIGN CURRENCIES—Variances from quarterly rates for February 1992 (continued):

Finland markka:

| | |
|---|---|
| February 3, 1992 | $0.229253 |
| February 12, 1992 | .228050 |
| February 13, 1992 | .226347 |
| February 14, 1992 | .225276 |
| February 18, 1992 | .222000 |
| February 19, 1992 | .221754 |
| February 20, 1992 | .221631 |
| February 21, 1992 | .221361 |
| February 24, 1992 | .221459 |
| February 25, 1992 | .222792 |
| February 26, 1992 | .221190 |
| February 27, 1992 | .222099 |
| February 28, 1992 | .223115 |

France franc:

| | |
|---|---|
| February 13, 1992 | $0.180897 |
| February 14, 1992 | .180375 |
| February 18, 1992 | .178285 |
| February 19, 1992 | .178571 |
| February 20, 1992 | .178555 |
| February 21, 1992 | .178364 |
| February 24, 1992 | .178412 |
| February 25, 1992 | .179372 |
| February 26, 1992 | .178047 |
| February 27, 1992 | .178987 |
| February 28, 1992 | .179630 |

Germany deutsche mark:

| | |
|---|---|
| February 12, 1992 | $0.622665 |
| February 13, 1992 | .616143 |
| February 14, 1992 | .614062 |
| February 18, 1992 | .606428 |
| February 19, 1992 | .607349 |
| February 20, 1992 | .607165 |
| February 21, 1992 | .605987 |
| February 24, 1992 | .606428 |
| February 25, 1992 | .609570 |
| February 26, 1992 | .604961 |
| February 27, 1992 | .608273 |
| February 28, 1992 | .610762 |

Ireland pound:

| | |
|---|---|
| February 13, 1992 | $1.645500 |
| February 14, 1992 | 1.639000 |
| February 18, 1992 | 1.622800 |
| February 19, 1992 | 1.621500 |
| February 20, 1992 | 1.619500 |
| February 21, 1992 | 1.617800 |
| February 24, 1992 | 1.620500 |
| February 25, 1992 | 1.627100 |
| February 26, 1992 | 1.615000 |
| February 27, 1992 | 1.621700 |
| February 28, 1992 | 1.629500 |

FOREIGN CURRENCIES—Variances from quarterly rates for February 1992 (continued):

Italy lira:

| | |
|---|---|
| February 13, 1992 | $0.000821 |
| February 14, 1992 | .000818 |
| February 18, 1992 | .000809 |
| February 19, 1992 | .000809 |
| February 20, 1992 | .000810 |
| February 21, 1992 | .000807 |
| February 24, 1992 | .000809 |
| February 25, 1992 | .000813 |
| February 26, 1992 | .000806 |
| February 27, 1992 | .000810 |
| February 28, 1992 | .000814 |

Malaysia dollar:

| | |
|---|---|
| February 28, 1992 | $0.386698 |

Netherlands guilder

| | |
|---|---|
| February 13, 1992 | $0.547435 |
| February 14, 1992 | .546001 |
| February 18, 1992 | .539171 |
| February 19, 1992 | .539695 |
| February 20, 1992 | .539549 |
| February 21, 1992 | .538503 |
| February 24, 1992 | .539084 |
| February 25, 1992 | .541800 |
| February 26, 1992 | .537548 |
| February 27, 1992 | .540453 |
| February 28, 1992 | .542682 |

Norway krone:

| | |
|---|---|
| February 13, 1992 | $0.157319 |
| February 14, 1992 | .156777 |
| February 18, 1992 | .154967 |
| February 19, 1992 | .154907 |
| February 20, 1992 | .154895 |
| February 21, 1992 | .154667 |
| February 24, 1992 | .154823 |
| February 25, 1992 | .155581 |
| February 26, 1992 | .154727 |
| February 27, 1992 | .155135 |
| February 28, 1992 | .155800 |

Portugal escudo:

| | |
|---|---|
| February 18, 1992 | $0.007045 |
| February 19, 1992 | .007050 |
| February 20, 1992 | .007055 |
| February 21, 1992 | .007047 |
| February 24, 1992 | .007055 |
| February 26, 1992 | .007030 |
| February 27, 1992 | .007070 |

FOREIGN CURRENCIES—Variances from quarterly rates for February 1992 (continued):

Spain pesata:

| | |
|---|---|
| February 13, 1992 | $0.009804 |
| February 14, 1992 | .009777 |
| February 18, 1992 | .009692 |
| February 19, 1992 | .009692 |
| February 20, 1992 | .009687 |
| February 21, 1992 | .009664 |
| February 24, 1992 | .009682 |
| February 25, 1992 | .009720 |
| February 26, 1992 | .009664 |
| February 27, 1992 | .009692 |
| February 28, 1992 | .009692 |

Sri Lanka rupee:

| | |
|---|---|
| February 4, 1992 | N/A |
| February 5, 1992 | N/A |
| February 6, 1992 | N/A |
| February 7, 1992 | N/A |
| February 10, 1992 | N/A |
| February 11, 1992 | N/A |
| February 13, 1992 | N/A |
| February 18, 1992 | N/A |
| February 19, 1992 | N/A |
| February 25, 1992 | N/A |
| February 28, 1992 | N/A |

Sweden krona:

| | |
|---|---|
| February 13, 1992 | $0.169880 |
| February 14, 1992 | .169319 |
| February 18, 1992 | .167266 |
| February 19, 1992 | .167266 |
| February 20, 1992 | .167280 |
| February 21, 1992 | .167070 |
| February 24, 1992 | .167364 |
| February 25, 1992 | .168209 |
| February 26, 1992 | .167140 |
| February 27, 1992 | .167757 |
| February 28, 1992 | .168421 |

Switzerland franc:

| | |
|---|---|
| February 12, 1992 | $0.694830 |
| February 13, 1992 | .685166 |
| February 14, 1992 | .681199 |
| February 18, 1992 | .671366 |
| February 19, 1992 | .671682 |
| February 20, 1992 | .671366 |
| February 21, 1992 | .669344 |
| February 24, 1992 | .670826 |
| February 25, 1992 | .673174 |
| February 26, 1992 | .667111 |
| February 27, 1992 | .671592 |
| February 28, 1992 | .673627 |

FOREIGN CURRENCIES—Variances from quarterly rates for February 1992 (continued):

| | |
|---|---|
| Thailand baht (tical): | |
| February 4, 1992 | N/A |
| February 5, 1992 | N/A |
| February 6, 1992 | N/A |
| United Kingdom pound: | |
| February 13, 1992 | $1.772500 |
| February 14, 1992 | 1.768500 |
| February 18, 1992 | 1.751000 |
| February 19, 1992 | 1.752000 |
| February 20, 1992 | 1.750000 |
| February 21, 1992 | 1.746500 |
| February 24, 1992 | 1.748000 |
| February 25, 1992 | 1.756000 |
| February 26, 1992 | 1.745500 |
| February 27, 1992 | 1.754000 |
| February 28, 1992 | 1.756000 |

(LIQ–03–01 S:NISD CIE)
Dated: March 3, 1992.

MICHAEL MITCHELL,
*Chief,*
*Customs Information Exchange.*

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19 CFR Part 113

(T.D. 92–26)

## REFUSAL TO ACCEPT NEW BONDS UNDERWRITTEN BY SENTRY INSURANCE A MUTUAL COMPANY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice informs the public that new bonds underwritten by Sentry Insurance a Mutual Company will not be accepted by any district director or regional commissioner of the Customs Service by virtue of 19 CFR 113.38.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Chief, Entry Rulings Branch, U.S. Customs Service, 1301 Constitution Ave. NW, Washington, D.C. 20229 (202–566–5856).

SUPPLEMENTARY INFORMATION: Under 19 CFR 113.38(c)(3), the Commissioner of Customs may, when she believes the circumstances

warrant, issue instructions to the district directors and regional commissioners that they shall not accept a bond secured by an individual or corporate surety when that surety, without just cause, is significantly delinquent either in the number of outstanding bills or dollar amounts thereof. The Commissioner of Customs has found Sentry Insurance a Mutual Company to be delinquent under this regulatory provision. The Commissioner notified the surety of the intended action by letter dated November 15, 1991.

The text of the letter is as follows:

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
*Washington, DC, November 15, 1991.*

BRUCE ROBERTS
SENTRY INSURANCE A MUTUAL COMPANY
*1800 North Point Drive*
*Stevens Point, Wisconsin 54401*

DEAR MR. ROBERTS:

By letters dated December 18, 1990, January 11, 1991 and April [undated], 1991, notice was provided to your company to pay or to show cause why you remain delinquent in regard to demands for payment under four general term bonds executed in 1979, 1980, 1981, and 1982 with Carey Industries, Incorporated, as principal. A fourth letter dated September 19, 1991, provided the same notice. Your agent has responded to each letter except for the one dated September 19, 1991.

Since you did not pay the amount demanded by Customs, the first three letters required that you provide justification for the failure to pay delinquent amounts or justify your continued delay in payment. You have failed to do either. Also, you have failed to pay the amount demanded, notwithstanding Customs fourth letter requiring that payment be made no later than September 30, 1991.

Therefore, I have decided to issue instructions to all District Directors and Regional Commissioners directing that no entries or other transactions secured by new single transaction or continuous bonds written by your company, be accepted beginning on the date that is five days after your receipt of this notice. This decision shall remain in effect for a minimum of five days or until all outstanding delinquencies of your company are resolved, whichever is later.

Pursuant to 19 CFR 113.38(c)(5), a copy of this decision shall be posted in each Customhouse nationwide and the decision will be published in the CUSTOMS BULLETIN. Additionally, a determination will be made as to whether to refer this matter to the Treasury Department pursuant to 113.38 for action to remove your company from Treasury Circular 570.

Sincerely,
CAROL HALLETT,
*Commissioner.*

This notice notifies the public of the Customs action.

Dated: March 2, 1992
File: BON–1–02–CO:R:C:E
223732 SMC

JOHN DURANT,
*Director,*
*Commercial Rulings Division.*

# U.S. Customs Service

## *General Notices*

### PATENT SURVEYS: PERIOD OF ELIGIBILITY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The United States Customs Service wishes to clarify its position with respect to the period during which patent surveys may be requested pursuant to Title 19, Code of Federal Regulations, Section 12.39a.

Title 19, Code of Federal Regulations, Section 12.39a permits the owner of a patent registered in the United States to request Customs assistance in obtaining the names and addresses of importers of merchandise which appears to infringe the patent. Title 35, United States Code, Section 286 provides for a six year statute of limitations during which a patent owner may initiate an action for infringement. This six year period extends beyond the expiration of a patent's term of registration with respect to any infringement that occurred while the registration was still in force.

It is Customs position, as a matter of policy and consistent with patent law, that this six year period is available with respect to patent surveys as well. The information obtained during a patent survey may be central to the patent owner's ability to prosecute violations of its rights within the established statute of limitations. Therefore, the owner of a patent for which the registration has expired may request a patent survey during the six years immediately following the expiration of that registration. Under no circumstances will patent surveys commenced during this six year period remain in effect beyond the sixth anniversary of the expiration of the patent registration.

EFFECTIVE DATE: March 12, 1992.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Intellectual Property Rights Branch, 1301 Constitution Avenue, N.W., Washington, D.C. 20229, (202) 566–6956.

Dated: March 3, 1992.

JOHN F. ATWOOD,
*Chief,*
*Intellectual Property Rights Branch.*

[Published in the Federal Register, March 12, 1992 (57 FR 8725)]

19 CFR Chapter I

## REVIEW OF CUSTOMS REGULATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Request for comments.

SUMMARY: Pursuant to the President's announcement of a 90-day regulatory review period, the Presidnt has asked each agency to identify and eliminate any unnecessary regulatory burden. This document requests that the public assist Customs by filling out and submitting a questionnaire that would identify Customs regulations that are believed to be burdensome, outdated or not cost-effective.

DATE: Responses should be submitted on or before March 25, 1992.

ADDRESS: Responses (preferably in triplicate) shall be addressed to Chairman, Regulatory Reform Working Group, U.S. Customs Service, Room 7113, 1301 Constitution Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John O'Loughlin, Regulatory Reform Working Group, 202–566–5853.

SUPPLEMENTARY INFORMATION:

### BACKGROUND

In a Memorandum for Certain Department and Agency Heads signed by the President on January 28, 1992, on the subject of reducing the burden of government regulation, President Bush established a 90-day regulation review period and requested that certain agencies, including the Department of the Treasury, work with the public in an effort to review regulations to reduce their economic burden on the American taxpayer.

A major part of this undertaking is the attempt to weed out regulations which impose needless costs on consumers and substantially impede economic growth. In particular, the President is concerned with regulatory programs that may have been justified when adopted, but fail to keep pace with important innovations and new technologies that could not have been foreseen at the time the regulations were promulgated.

In his memorandum, the President set forth the following standards for effective regulations:

1. The expected benefits to society of any regulation should clearly outweigh the expected costs it imposes on society.
2. Regulations should be fashioned to maximize net benefits to society.
3. To the maximum extent possible, regulatory agencies should set performance standards instead of prescriptive command-and-control requirements, thereby allowing the regulated community to achieve regulatory goals at the lowest possible cost.

4. Regulations should incorporate market mechanisms to the maximum extent possible.

5. Regulations should provide clarity and certainty to the regulated community and should be designed to avoid needless litigation.

## CUSTOMS REQUEST FOR PUBLIC INPUT

In response to the President's request for review of regulations, Customs has developed a Regulatory Reform Working Group and is making a concerted effort to review all its regulations. In addition, by this document, Customs is asking for the public to assist the agency in determining whether there are any portions of the Customs Regulations which are either outdated or burdensome, as defined by the President.

Customs has prepared the attached form by which members of the public may offer suggestions on those Customs regulations which they believe can be eliminated or modified pursuant to the President's initiative. The form is an exact copy of the one sent to all Customs employees by the Regulatory Reform Working Group. Note that the form asks for very specific information on the regulations recommended for modification or repeal. This information is crucial to any decision to amend or repeal regulations and is necessary to be provided at this time due to the time constraints involved in the program. Answer all questions, if you can, and please be as specific as possible. We anticipate a large number of responses and the more detailed information Customs receives, the easier it will be for Customs to evaluate the suggestions.

Please note that this program is in response to the President's call for a 90-day review and therefore, time is of the essence.

Responses should be submitted no latter than March 25, 1992. Completed forms should be sent directly to:

Chairman,
Regulatory Reform Working Group
U.S. Customs Service, Room 7113
1301 Constitution Avenue, NW
Washington, D.C. 20229

## CUSTOMS REGULATIONS REVIEW FORM

1. What is the subject of the regulations you are recommending be modified or repealed?

2. Which sections in particular are you recommending be modified or repealed?

3. What is the statutory basis for these regulations as they currently exist?

4. What do you believe is the statutory basis for Customs to amend or repeal these regulations?

5. What is the exact nature of your suggestion as to how the regulations can be amended or repealed? If your are recommending an amendment, please specify the precise nature of the change.

6. What is the expected benefit in your suggested modification or repeal? Specify savings in time and/or money and whether to Customs, the public, or both. Quantify, if possible.

7. Are there any provisions of the Customs Regulations or other agency's regulations which will be affected by your suggested change? Please specify those sections and indicate the impact, if known.

8. If you are aware of any arguments against Customs making the changes you are recommending, please indicate these and state why you still believe Customs should implement the change.

Approved: March 5, 1992.

CAROL HALLETT,
*Commissioner of Customs.*

[Published in the Federal Register, March 9, 1992 (57 FR 8283)]

# United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

*Chief Judge*

Dominick L. DiCarlo

*Judges*

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

*Senior Judges*

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

*Clerk*

Joseph E. Lombardi

# Decisions of the United States Court of International Trade

(Slip Op. 92–15)

TORRINGTON CO., PLAINTIFF, FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, SKF USA INC., SKF INDUSTRIE, S.P.A., AND FAG CUSCINETTI S.P.A., DEFENDANT-INTERVENORS

Court No. 91–08–00568

Plaintiff moves for a Judicial Protective Order pursuant to Rule 7(f) of the Rules of this Court granting its counsel access to confidential materials contained in the administrative record; in addition, plaintiff seeks access to computer tapes containing computer instructions, information contained in SAS data sets and hard copy, written documentation for each file transmitted on tape.

*Held:* Plaintiff's motion for a Judicial Protective Order, as submitted, is denied.

[Plaintiff's motion denied.]

(Dated February 21, 1992)

*Stewart and Stewart* (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Geert De Prest* and *Margaret E.O. Edozien*) for plaintiff.

*Frederick L. Ikenson, P.C.* (*Frederick L. Ikenson, J. Eric Nissley* and *Joseph A. Perna, V*) for Federal-Mogul Corporation.

*Stuart M. Gerson*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis* and *Jane E. Meehan*); of counsel: *Douglas S. Cohen, Dean A. Pinkert* and *D. Michael Kaye*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

*Howrey & Simon* (*Herbert C. Shelley, Alice A. Kipel, Scott A. Scheele* and *Thomas J. Trendl*) for SKF USA INC. and SKF INDUSTRIE, S.p.A.

*Grunfeld, Desiderio, Lebowitz & Silverman* (*Max F. Schutzman, David L. Simon* and *Andrew B. Schroth*) for FAG CUSCINETTI SpA.

## OPINION

TSOUCALAS, *Judge:* In this action, plaintiff challenges the final determination of the International Trade Administration, U.S. Department of Commerce (hereinafter "ITA" or "Commerce"), in *Anti-friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy; Final Results of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 31,751 (1991). Plaintiff has requested access to confidential materials contained in the administrative record. Included in the request, plaintiff asks for (1) a computer tape of computer programming

instructions;[1] (2) a computer tape containing information contained in each SAS data set processed by the computer programs used by Commerce (hereinafter "SAS data sets");[2] and (3) a hard copy, written documentation for each file transmitted on tape. Since no agreement could be reached among the parties concerning the disclosure of these materials, plaintiff brought this motion for access under a Judicial Protective Order.

DISCUSSION

Plaintiff claims that it is entitled through its counsel to the computer instructions, SAS data sets and the hard copy because they are part of the administrative record. While plaintiff is entitled to the administrative record as it existed before the administrative agency,[3] it is not entitled to the computer instructions, SAS data sets and hard copy since they simply are not part of the administrative record.

Pursuant to 19 U.S.C. § 1516a(b)(2)(A) (1988), the administrative record consists of:

> (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title;[4] and
>
> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

Furthermore, pursuant to 19 U.S.C. § 1516a(b)(2)(B), documents classified as confidential may be viewed under the terms set forth by the court.[5]

The materials requested by plaintiff, however, are not part of the administrative record. They were not "presented to" or "obtained by" the administrative agency, nor do they even exist. According to the affidavit of David P. Mueller, Director of the Office of Policy, Import Administration, U.S. Department of Commerce, in the "typical case, tape versions

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[1] Plaintiff requests the computer program used by the ITA to generate the Final Results of the Administrative Review in machine-readable form (ASCII) on unlabeled tape in fixed block format less than 32K bytes per block and density of 6250 or 1600 bpi.

[2] Plaintiff requests the information to be recorded in the form of machine-readable sequential data files recorded in fixed block format less than 32K bytes per block on unlabeled tape, either 6250 or 1600 bpi together with the instructions.

[3] *See American Brass v. United States*, 12 CIT 1068, 1069, 699 F. Supp. 934, 935 (1988); *Daewoo Elecs. Co. v. United States*, 10 CIT 754, 650 F. Supp. 1003 (1986).

[4] 19 U.S.C. § 1677f(a)(3) states that:

> The administering authority and the Commission shall maintain a record of ex parte meetings between-
>
> (A) interested parties or other persons providing factual information in connection with an investigation, and
>
> (B) the person charged with making the determination,and any person charged with making a final recommendation to that person, in connection with that investigation.

[5] 19 U.S.C. § 1516a(b)(2)(B) reads as follows:

> (B) Confidential or privileged material.-The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

of the SAS computer programs and data sets *do not exist*. and they *do not currently exist* in this case. Although certain computer tapes were created in this case to facilitate in the process of preparing microfilm for the court records, these tapes are not the same tapes being sought by Torrington." Affidavit of David P. Mueller at 3 (emphasis in original). Therefore, if these materials do not exist then they simply cannot be part of the administrative record. Furthermore, the administrative record is limited to the particular review proceeding which results in the determination which is the subject of challenge. *Beker Indus. Corp. v. United States*, 7 CIT 313 (1984). Any information received by Commerce after the particular determination at issue is not part of the reviewable administrative record. *Ipsco, Inc. v. United States*, 13 CIT 489, 494, 715 F. Supp. 1104, 1109 (1989). Thus, since the computer tapes and the hard copy do not exist, then they would have to be created after the determination and therefore would not be part of the administrative record.

Plaintiff alleges that the computer tapes are necessary to this litigation in order to duplicate the ITA's calculations and verify their findings for accuracy. Access to the tapes, however, is not essential to this litigation as plaintiff will receive the microfilmed computer printouts containing both the computer programming instructions as well as the SAS data sets.

In *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982), *cert. denied*, 459 U.S. 971 (1982), the Ninth Circuit held that appellants were not entitled to computer tapes since all the information on the computer tapes was included on wage cards which the appellants had discovered. The Court stated that "[w]hile using the cards may be more time consuming, difficult and expensive, these reasons, of themselves, do not show that the trial judge abused his discretion in denying appellants the tapes." *Id.* at 933.

Furthermore, this court has also denied a party's request for similar materials after balancing the need of the plaintiffs against the hardship of the defendant in producing this type of information. *See NTN Bearing Corp. v. United States*, Court No. 87–11–01066 (CIT, Sept. 9, 1988).[6] Similarly, this court, on several other occasions, has denied a plaintiff's motion requiring Commerce to create computer tapes. *NTN Bearing Corp. v. United States*, Court No. 89–06–00350 (Order dated May 17, 1990); *Torrington Co. v. United States*, Court No. 89–06–00311 (Order dated April 30, 1990); *Torrington Co. v. United States*, Court No. 89–06–00357 (Order dated April 30, 1990); *Torrington Co. v. United States*, Court No. 89–06–00358 (Order dated April 30, 1990); *Torrington Co. v. United States*, Court No. 89–06–00359 (Order dated April 30, 1990). Conversely, this Court also has granted requests for electroni-

[6] In *NTN Bearing Corp. v. United States*, Court No. 87–11–01066 (CIT, Sept. 9, 1988) this Court stated that:

> [T]he movants have neither articulated the precise need for discovery nor detailed any hardship they will encounter if the instant motion is denied. Defendants, on the other hand, have cogently enumerated administrative and fiscal burdens they will endure if a discovery order is issued.

cally stored data. *See Daewoo*, 10 CIT 754, 650 F. Supp. 1003; *The Timken Co. v. United States*, 11 CIT 267, 659 F. Supp. 239 (1987).

The Court in *Timken*, however, noted that each case must be decided on its own facts. The Court stated that:

> The instant case should not be understood as authority for compelling the distribution of computer tapes in all administrative proceedings. The court's decision turned on a wide range of factors, including the need of the party requesting the information and the need of the party submitting it for continued confidential treatment. In subsequent cases these factors and other relevant concerns will no doubt present themselves in a much different balance.

*Timken*, 11 CIT at 272, 659 F. Supp. at 243.

In the instant litigation, plaintiff has not adequately articulated the need for the computer tapes. Defendant, however, has validly enumerated extreme hardship if it was compelled to create the tapes.

In addition, the Court in *Timken* granted plaintiff the computer tapes at a time when Commerce had not yet made its final determinations stating that "it is imperative that parties be able to draw distinctions between a number of potentially reasonable approaches at the administrative level." *Id.* at 271 n.7, 659 F. Supp. at 242 n.7.

In this case, however, plaintiff is requesting the information *after* the final determination has been made by Commerce at which time judicial review by this Court is limited to whether Commerce's determinations were "unsupported by substantial evidence on the record, or otherwise not in accordance with law." *See* 19 U.S.C. § 1516a(b)(1)(B) (1988).

Plaintiff relies heavily on the court's decision in *Daewoo v. United States*, 10 CIT 754, 650 F. Supp. 1003. In that case, the court ordered Commerce to provide all computerized data. It was further stated that this meant to include "all further refined forms of electronic storage of the data involved." *Id.* at 757, 650 F. Supp. at 1006. In *Daewoo*, however, the government did not demonstrate to the court any hardship or burden since the materials were already on existing computer tape. In this case the data requested does not exist and Commerce would be required to create the computer tapes at great burden and expense.

There are several factors the Court must consider when deciding whether to grant discovery requests to a party. Pursuant to Rule 26(b)(1)(a) of the Rules of this Court, the production of discovery "shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive."

Torrington and the ITA each claim that they would have to incur substantial costs to create the materials requested. An affiant in *Timken*, 11 CIT at 268, 659 F. Supp. at 241, estimated that it would take a keypuncher 7,500 hours to create a computer tape containing the 15,000 pages of printout that was already created. *Id.* In this case, Torrington is asking Commerce to do exactly the same thing at their own time and ex-

pense.[7] In fact, Mr. Mueller's affidavit estimated that it would take his staff "no less than two weeks" to produce the tapes requested by plaintiff. *See* Mueller Affidavit at 3.

Generally, if a party has demonstrated the need for confidential documents, they will be given unless the burden of one party outweighs the need of the other party. Plaintiff does not have "an absolute right of access to the tapes." *American Brass*, 12 CIT at 1070, 699 F. Supp. at 936.

Where the burden, cost and time required to produce the tapes is virtually equal on both parties, then the burden of producing the tapes falls on the party requesting the information. To do otherwise would be unfair to Commerce. Furthermore, there is no statute or court rule requiring an agency to create new materials for inclusion in the administrative record or to include information in a particular form. An order requiring Commerce to create the computer tapes and hard copy documentation to Torrington's specifications would impose significant administrative and fiscal hardships upon Commerce and would unnecessarily delay the disposition of this litigation. Thus, the parties are obliged to utilize a source that is "more convenient, less expensive or less burdensome," and that source is the computer printouts supplied by Commerce. *See* USCIT R. 26(b)(1)(a).

Commerce contends that complete printouts, including the entire SAS program log and the entire SAS output log, will be part of the administrative record. *Defendant's Memorandum in Opposition to the Motion of the Torrington Company for a Judicial Protective Order* at 3, 7. Moreover, Commerce has agreed to provide the parties with a microfilm copy of the record pursuant to an appropriate Judicial Protective Order. *Id.* at 8.

## Conclusion

Accordingly, plaintiff's motion for a Judicial Protective Order is denied with respect to its request for (1) computer tapes containing the computer program instructions used by the ITA to generate the final results of the administrative review in the format requested by Torrington; (2) computer tapes containing the information contained in each SAS data set processed by the SAS computer programs used by the ITA to generate the final results in the format requested by Torrington; and (3) hard copy, written documentation for each file transmitted on tape, since these materials do not exist and it would be an undue burden on Commerce to produce them. Furthermore, Torrington will resubmit to the Court within 15 days from the date of this order, after consultation with counsel for the other parties, a proposed Judicial Protective Order which excludes references to the three matters referred to above.

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[7] In *Daewoo* and *Timken* the undue burden on the government was not at issue since the tapes were already produced. The Court in *Daewoo* stated that: "This court is not requiring the government to create something new or to render exceptional assistance. It is simply requiring that an existing body of data be transmitted in a reasonably usable way with a modicum of cooperation." *Daewoo*, 10 CIT at 757, 650 F. Supp. at 1006. In contrast, plaintiff in this action is requesting Commerce to create something that is not in existence.

(Slip Op. 92–16)

HOSIDEN CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–10–00720

[Plaintiff Hosiden's motion to amend the administrative record, or in the alternative to remand the proceeding, and motion for discovery conference denied.]

(Dated February 24, 1992)

*Adduci, Mastriani, Meeks & Schill*, (Louis Mastriani, Ralph H. Sheppard, Anri Suzuki, and Gregory C. Anthes), for plaintiff Hosiden.

*Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Vanessa P. Sciarra*), *Gregory Shorin*, Of Counsel, Attorney-Advisor, Office of the Chief Counsel for International Trade, United States Department of Commerce, for defendant.

MEMORANDUM OPINION AND ORDER

GOLDBERG, *Judge:* This action is before the court on plaintiff Hosiden's motion to amend the administrative record, or in the alternative to remand the proceeding, and its motion for discovery conference.

BACKGROUND

This dispute arises out of a final determination of the United States Department of Commerce International Trade Administration ("ITA") that plaintiff Hosiden, as well as numerous other parties, made sales of high information content flat panel displays in the United States at less than fair value. 56 Fed. Reg. 32376 (July 8, 1991).

In the course of its dumping investigation, the ITA commenced verification of information received from plaintiff Hosiden. As a part of the verification, the ITA sought the assistance of technical consultant Dr. David Morton. Dr. Morton prepared an initial verification report dated May 20, 1991, that was made available to plaintiff Hosiden. Plaintiff Hosiden was then permitted to submit briefs in connection with the verification process.

After the briefs were filed, the ITA requested clarification from Dr. Morton of certain information he reviewed. In response, Dr. Morton prepared a confidential supplemental report dated June 26, 1991. The ITA relied, in part, on this supplemental report in preparing a constructed value calculation adjustment memorandum dated July 5, 1991.

Plaintiff Hosiden first learned of Dr. Morton's supplemental report on July 15, 1991, when the ITA conducted a disclosure conference to discuss the calculation methodology used in the final determination. Plaintiff Hosiden acknowledges that the ITA informally provided Dr. Morton's June 26, 1991 report to it in late July, 1991.

Additionally, Dr. Morton's June 26, 1991 report and the July 5, 1991 calculation adjustment memorandum are part of the confidential portion of the administrative record filed with this court in the action. A

public version of the July 5, 1991 calculation memorandum is also included in the public document portion of the administrative record.[1]

## DISCUSSION

In its motion to amend the administrative record, or in the alternative to remand the proceeding, plaintiff Hosiden asks this court to remove Dr. Morton's June 26, 1991 report and the related July 5, 1991 memorandum from the administrative record. Alternatively, plaintiff Hosiden seeks a remand to provide it with the opportunity to comment upon the report at the agency level. In its motion for a discovery conference, plaintiff Hosiden seeks discovery regarding the ITA's failure to notify plaintiff Hosiden of the existence of Dr. Morton's supplemental report and its failure to place the June 26, 1991 report into the public record.

The court first turns to plaintiff Hosiden's motion to amend the administrative record. The ITA is statutorily required to include in the administrative record all documents upon which it relies. 19 U.S.C. § 1516a(b)(2)(A). Since Dr. Morton's June 26, 1991 report and the calculation adjustment memorandum were actually examined by the ITA, these documents are properly part of the administrative record. Plaintiff Hosiden's argument that the June 26, 1991 supplemental report should be omitted because a public version was not created is extraneous. It does not alter the fact that the ITA indeed used this document, and that it, therefore, must be incorporated into the administrative record. The motion to amend the administrative record is hereby denied.

Next, plaintiff Hosiden seeks remand permitting it to comment on Dr. Morton's supplemental report at the administrative level.

The ITA's obligation to maintain a record is "for purposes of judicial review." The participating party's right "is to be more fully aware of the presentation of information to the administering authority." *Timken Co. v. United States*, 699 F. Supp. 300 (CIT 1988). Consequently, *Timken* found that a party's rights were not automatically violated although it was prevented from commenting on a particular document because the record was replete with evidence of the party's previous involvement in the action.

The court finds here that plaintiff Hosiden has likewise not carried its burden of showing that its rights were significantly abridged. Dr. Morton's June 26, 1991 report was prepared only thirteen days prior to the publication of the final determination. Had plaintiff Hosiden been aware of the report prior to the final determination, it could not have submitted responsive factual information to the ITA.[2] The ITA provided plaintiff Hosiden with a copy of Dr. Morton's supplemental report in late July, 1991. Additionally, the ITA properly included Dr. Morton's

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[1] It appears a public version of Dr. Morton's supplemental report was never prepared.

[2] 19 C.F.R. 353.31(a)(i) (1991) provides that:

submission of factual information for the Secretary's consideration shall be submitted not later than:

(i) For the Secretary's final determination, seven days before the scheduled date on which the verification is to commence * * *.

June 26, 1991 report as well as confidential and public versions of the related July 5, 1991 memorandum in the administrative record filed with this court. Therefore, plaintiff Hosiden has all the information presented to the ITA available to it now. It retains the ability to present all arguments concerning the documents which it could have presented to the ITA within the context of its 56.1 and Reply briefs.

Further, because the entire record is before this court, the court will be able to conduct a comprehensive review after the action is finally submitted, pursuant to its statutory mandate, to ascertain whether the ITA's decision was "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1990). Therefore, this court finds that plaintiff Hosiden's right to full knowledge of the information considered by the ITA has not been restricted.

Moreover, the court notes that granting the requested remand would serve only to unnecessarily delay the final resolution of this action at the unwarranted expense of the public's interest in expeditious litigation.

Accordingly, plaintiff Hosiden's request for remand is denied.

In regard to plaintiff Hosiden's motion for discovery conference, this court notes that the scope of judicial review is normally confined to information contained in the administrative record. Discovery outside the record is usually granted only where the requesting party makes a "strong showing of bad faith or improper behavior" by the officials involved. *Saha Thai Steel Pipe Co. v. United States*, 661 F. Supp. 1198, 1201 (CIT 1987). Plaintiff Hosiden has made no showing here of bad faith or improper action, nor has it demonstrated how such discovery, even if permitted, would benefit the court or the parties. The motion is also denied.

## CONCLUSION

Plaintiff Hosiden's motions to amend the administrative record, or in the alternative to remand the proceeding, and motion for discovery conference are hereby denied.

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